

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

ERIK EGBERT,)
)
) Petitioner,)
)
) v.) No. 21-147
)
ROBERT BOULE,)
)
) Respondent.)

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4 Petitioner,)

5 v.) No. 21-147

6 ROBERT BOULE,)

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9

10 Washington, D.C.

11 Wednesday, March 2, 2022

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:00 a.m.

16

17 APPEARANCES:

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19 of the Petitioner.

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23 Petitioner.

24 FELICIA H. ELLSWORTH, ESQUIRE, Boston, Massachusetts;
25 on behalf of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 21-147, Egbert versus Boule.

Ms. Harris.

ORAL ARGUMENT OF SARAH M. HARRIS

ON BEHALF OF THE PETITIONER

MS. HARRIS: Mr. Chief Justice, and may it please the Court:

This Court should not expand Bivens for the first time in 40 years.

First, Bivens extensions clash with modern precedent. Bivens interpreted federal courts' jurisdiction over federal questions as authorizing courts to fashion new damages actions. Decades of intervening cases reject that premise and remove any doctrinal basis for Bivens extensions.

Second, this Court has held that any reason to think Congress might doubt the efficacy or the necessity of a damages remedy bars new Bivens actions. Abbasi and Hernandez make respect for the separation of powers the key consideration. But the Constitution vests

1 Congress alone with the power to create damages
2 actions. Abbasi and Hernandez say courts must
3 pause if the judiciary isn't well suited to
4 assess the systemic costs and benefits of a new
5 damages action. But courts are never equipped
6 for such predictive empirical judgments.

7 Abbasi and Hernandez also rule out
8 Bivens extensions if Congress has extensively
9 legislated in an area. But Congress has
10 extensively legislated about federal officer
11 liability without allowing individual damages
12 actions.

13 Third, at the very least, this Court
14 should not expand Bivens to First Amendment
15 retaliation claims or to Fourth Amendment claims
16 involving border security. Those claims raise
17 yet further grounds for pause and would explode
18 the universe of Bivens claims.

19 For First Amendment retaliation
20 claims, plaintiffs could portray virtually any
21 governmental action as unconstitutional if taken
22 for retaliatory reasons, creating especially
23 amorphous Bivens liability.

24 Further, allowing First and Fourth
25 Amendment claims against agents involved in

1 border security also implicates national
2 security, as Hernandez recognized.

3 And, finally, there are many
4 alternative means to protect these
5 constitutional interests.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Well, Ms. Harris, the
8 -- when you have a -- the Fourth Amendment claim
9 in Bivens is similar to the Fourth Amendment
10 claim here, so why doesn't that foreclose your
11 argument that that's excluded?

12 MS. HARRIS: We respectfully disagree.
13 The Fourth Amendment claim in Bivens is quite
14 different from the claim here for a number of
15 reasons.

16 First of all, the class of defendants
17 and the statutory mission of the officers is
18 exceedingly different. The Federal Bureau of
19 Narcotics' mission is not the same in any
20 respect as the statutory mandate under which
21 Border Patrol officers are operating, and that
22 is an important factor under Abbasi for a new
23 context.

24 And, on top of that, we know, because
25 Congress and the Court have said so, that the

1 Fourth Amendment applies differently in a border
2 context. And that, I think, also goes to the
3 Border Patrol functions. Border Patrol agents
4 are in dangerous circumstances every day trying
5 to interdict terrorists, smugglers, illegal
6 entry and exit of foreign nationals crossing the
7 border.

8 JUSTICE THOMAS: But couldn't you say
9 something similar to that about police officers
10 and the Fourth Amendment? I mean, it seems to
11 be pretty much the same thing.

12 Beyond that, though, the -- if the
13 Court adopted your approach, what survives as
14 far as Bivens claims go?

15 MS. HARRIS: What survives is what we
16 think the Court recognized in Abbasi would
17 survive. So the Court said in Abbasi that it is
18 not questioning the necessity or the stare
19 decisis value of Bivens in the
20 search-and-seizure context in which it arose.

21 And I think the next paragraph ill --
22 of Abbasi illustrates the Court was
23 distinguishing between claims that would not be
24 a new context for Bivens and claims that would
25 be. So, again, I think, if you look at the

1 facts of Bivens and the things that perhaps the
2 DEA is doing today, that would absolutely
3 survive.

4 I don't think you have to resolve
5 exactly what is -- is or is not a new context
6 because this case, I think, is really about what
7 happens when there is a Bivens extension on the
8 table when there is something that is absolutely
9 a new context and what factors should courts be
10 considering in order to resolve that question.

11 CHIEF JUSTICE ROBERTS: Well, what is
12 so different? This was a search of somebody on
13 private prop -- an unlawful search on private
14 property. I mean, it was near the Canadian
15 border. Okay. The guy was a border agent.
16 Well, that doesn't seem to be particularly
17 relevant to -- to whether the other fellow was
18 subject to an illegal search on his private
19 property.

20 MS. HARRIS: Well, I think there are
21 two really important things that are missing
22 from that sort of picture of it, one of which is
23 that I think everyone agrees that Agent Egbert
24 was involved in an immigration investigation and
25 that was the whole reason for being on Mr.

1 Boule's property, which, again, was a notorious
2 site of smuggling and illegal entry and exit.

3 So the fact that the Border Patrol
4 agent was indeed exercising --

5 CHIEF JUSTICE ROBERTS: So they have
6 -- they have more flexibility under the Fourth
7 Amendment than a regular police officer, you
8 know, in -- in Des Moines?

9 MS. HARRIS: Yes, and I think, under
10 both the Court's precedents and what Congress
11 has said, that is absolutely the case. So the
12 Court's Montoya decision recognizes the Fourth
13 Amendment does apply differently at the border,
14 and Section 8 U.S.C. 1357 is Congress's
15 recognition that in the border context, there
16 are a lot of different warrantless searches,
17 arrests, et cetera, et cetera, that can happen
18 at the border that you would not have in Des
19 Moines.

20 And I think all of that's important
21 because this goes to what the Court said in
22 Hernandez with respect to the conduct of agents
23 stationed at the border inherently implicates
24 national security. That was absolutely true of
25 Agent Mesa in Hernandez and, I think, applies

1 equally here because the Court in Hernandez was
2 talking about the kinds of functions Border
3 Patrol agents are performing at the border,
4 which again involve --

5 CHIEF JUSTICE ROBERTS: Well, that's
6 really your point. It has nothing to do with
7 geography. It's what he was doing, right?

8 MS. HARRIS: It's --

9 CHIEF JUSTICE ROBERTS: He was -- he
10 was a Border Patrol agent, but it's not -- we
11 don't have this sort of Fourth Amendment free
12 zone around the border.

13 MS. HARRIS: That's correct. I think
14 you have to tie it, obviously, to the officer's
15 functions. So, if we were talking about, you
16 know, an IRS agent who happens to be stationed
17 at the border, there might be different issues
18 with a Bivens claim in that context, but we
19 wouldn't be saying just because the IRS agent is
20 at the border means they can -- you know, they
21 are entitled to flexibility --

22 JUSTICE SOTOMAYOR: I thought that --

23 MS. HARRIS: -- with respect to the
24 border.

25 JUSTICE SOTOMAYOR: -- the issue here

1 was excessive force, and I thought that the
2 person making the claim was a U.S. citizen.
3 And, in Bivens, it was an excessive force claim
4 in an -- in a private home. Here, it's an
5 excessive force claim on the property of an inn
6 owned by a U.S. citizen.

7 I understand that Customs regulations
8 require agents to secure warrants absent exigent
9 circumstances, and we can debate whether this
10 was exigent circumstances justifying his entry
11 into this home and his decision to do what he
12 did. I'm not going to get into those details.

13 But I go back to Justice -- the
14 Chief's question, which is in what ways does the
15 Fourth Amendment -- not -- the Fourth
16 Amendment's excessive force claim differ between
17 law enforcement agents like narcotics agents,
18 alcohol -- alcohol and tobacco and firearm
19 agents, or Border Patrol?

20 I thought that none of them
21 constitutionally can use excessive force.

22 MS. HARRIS: Justice Sotomayor, I
23 think there are a couple reasons why --

24 JUSTICE SOTOMAYOR: Just answer that
25 question. Can any of them use excessive force?

1 Being defined as force greater than that
2 necessary.

3 MS. HARRIS: No, of course, excessive
4 force is something the Fourth Amendment
5 prohibits, but I think that is not quite the
6 inquiry when you're thinking about what is a new
7 context or what are special factors because we
8 also --

9 JUSTICE SOTOMAYOR: Well, what's the
10 special factor here? That it's the border,
11 you're saying, it's Customs agents, but I don't
12 understand how they don't have the same
13 constitutional protections that officers have,
14 qualified immunity, so there's nothing that
15 we've already said in Wilson versus Sellers that
16 in a Bivens claim qualified immunity exists.

17 So they have the right to use their
18 reasonable judgment and not engage in
19 constitutional conduct. I -- I don't understand
20 why this is a new context.

21 MS. HARRIS: So two points there.

22 First of all, with respect to why this
23 is a new context, I -- I think the Abbasi
24 factors are very clear that a statutory mandate
25 and a different level of judicial guidance makes

1 the claim meaningfully different.

2 And with respect to excessive force
3 claims at the border, both Congress and the
4 Court have recognized that the need for lethal
5 force in certain circumstances and the rules of
6 engagement are fundamentally different.

7 JUSTICE BREYER: That's not --

8 MS. HARRIS: That has to do --

9 JUSTICE BREYER: -- this case, is it?

10 MS. HARRIS: Well, I think it is
11 relevant to this case just for the same --

12 JUSTICE BREYER: I mean, I'm not
13 saying it isn't relevant. I just said this
14 isn't a case where they're having special rules.
15 This isn't a case where they're right at the
16 border. This is a case of, you know, what the
17 Chief Justice said, okay.

18 There are 83, I gather, with -- Bureau
19 of Justice statistics says there are 83
20 different agencies where the officers are
21 federal, they are authorized to make arrests,
22 they carry firearms, they provide police
23 protection as their primary function.

24 And I take it you think that Bivens
25 still applies in Shasta County, California,

1 doesn't it?

2 MS. HARRIS: I think it would depend
3 on --

4 JUSTICE BREYER: No, no, no, it
5 depends on whether it applies. Exactly the same
6 as the Bivens case, it's Shasta County,
7 California. It's not New York. Apply?

8 MS. HARRIS: Yes.

9 JUSTICE BREYER: Of course.

10 MS. HARRIS: But I think the --

11 JUSTICE BREYER: And you think it
12 applies in April and May of this year, even
13 though Bivens didn't take place in April and
14 May?

15 MS. HARRIS: Yes, those are --

16 JUSTICE BREYER: Okay.

17 MS. HARRIS: -- per the early records.

18 JUSTICE BREYER: Fine. And now which
19 of these 83 agencies does it not apply to?

20 MS. HARRIS: So I think the question
21 under Abbasi is --

22 JUSTICE BREYER: What?

23 MS. HARRIS: -- what is the statutory
24 -- one of the questions, frankly --

25 JUSTICE BREYER: And one of the --

1 MS. HARRIS: -- what is the statutory
2 mission.

3 JUSTICE BREYER: -- missions with
4 these people is they often fly in air -- in
5 helicopters to help keep the peace with others
6 who are just ordinary policemen or FBI men.

7 What -- I mean, I was going to ask
8 you, what do you think about the Federal Bureau
9 of Prisons, the police there? Does it apply
10 there?

11 MS. HARRIS: The Federal Bureau of
12 Prisons, I think probably not because their
13 statutory --

14 JUSTICE BREYER: No Bivens in the
15 Federal Bureau of Prisons?

16 MS. HARRIS: So --

17 JUSTICE BREYER: Okay. Even there.
18 No Bureau -- what about the Federal Bureau of
19 Investigation? Does it apply there?

20 MS. HARRIS: I think it likely is a
21 new context, and the reason is the Abbasi --

22 JUSTICE BREYER: Not the Federal
23 Bureau of Investigation? Bivens doesn't apply
24 to FBI agents? Is that what you're saying?

25 MS. HARRIS: I'm saying it's a new

1 context, you'd have to run special factors, and
2 the reason for that is I think it's a faithful
3 application of Abbasi --

4 JUSTICE BREYER: I see.

5 MS. HARRIS: -- because the statutory
6 --

7 JUSTICE BREYER: Okay.

8 MS. HARRIS: -- mission is --

9 JUSTICE BREYER: All right. I'm just
10 getting your point of view.

11 MS. HARRIS: Okay.

12 JUSTICE BREYER: And the -- the --
13 the -- what about the Drug Enforcement
14 Administration?

15 MS. HARRIS: So the question for the
16 DEA is that is the successor agency to the
17 Federal Bureau of Narcotics, and, again, I think
18 you have to run through the Abbasi factors.

19 JUSTICE BREYER: Okay. I get it.
20 I'll give you two more. Bureau of Alcohol,
21 Tobacco, Firearms, and Explosives, in your
22 opinion, is it obvious that it does apply there,
23 not obvious, or we go through some mechanism?

24 MS. HARRIS: I think you apply Abbasi,
25 not obvious, because, again --

1 JUSTICE BREYER: Okay.

2 MS. HARRIS: -- the question has to
3 do --

4 JUSTICE BREYER: Last one, U.S. Mint
5 Police. I actually don't know what the U.S.
6 Mint Police does, but I suspect it's important
7 so people don't take all the gold out of Fort
8 Knox or something, but -- but do the same thing?
9 Does it apply, obviously, not apply?

10 MS. HARRIS: Again --

11 JUSTICE BREYER: And, by the way, if I
12 wanted to, which I don't because my colleagues
13 would lynch me, the -- I -- I could go through
14 78 more.

15 MS. HARRIS: Yes.

16 JUSTICE BREYER: And what they have in
17 common, they carry firearms, they provide police
18 protection, they're authorized to make arrests.
19 But you're saying that isn't enough?

20 MS. HARRIS: I'm saying --

21 JUSTICE BREYER: We're going to --

22 MS. HARRIS: -- that's not enough
23 because grouping all 83 federal agencies
24 together when they're -- when they range from
25 the Secret Service, which has obviously a

1 primary mission, to other law enforcement
2 agencies is not only new but raises really hard
3 questions for courts that I don't think courts
4 are equipped to consider --

5 JUSTICE BARRETT: Ms. --

6 MS. HARRIS: -- under Abbasi.

7 JUSTICE BARRETT: -- Ms. Harris, can I
8 follow up on Justice Breyer's questions? Is --
9 is your inquiry driven by the mission of the
10 agency or the mission of the federal officer in
11 the particular situation?

12 So, for example, would your position
13 change if, here, Egbert had gone in because he
14 was -- he just suspected that there had been a
15 domestic dispute and he was helping out local
16 law enforcement and he went in?

17 Is what matters the fact that he is a
18 Border Patrol agent, or is what matters that
19 when he went in, he was investigating the
20 potential smuggling?

21 MS. HARRIS: So I honestly think it's
22 both because Abbasi seems to be looking at both
23 the class of defendants, the implications for
24 the agency, and also the statutory mandate under
25 which the officer is operating.

1 And I say that because, in a lot of
2 circumstances, it's going to be difficult to
3 sort of separate out in one particular instance
4 which exactly are -- you know, is there an
5 overlapping sort of statutory mandate an officer
6 is executing.

7 And I think that also goes to the
8 special factors analysis in the sense that the
9 ultimate -- one of the ultimate questions is,
10 are courts well-equipped to figure out the costs
11 and benefits government-wide --

12 JUSTICE BARRETT: Well, so, in my --
13 in my hypothetical, where the border agent --
14 where Egbert goes in and he's not investigating
15 a border issue, but he's investigating a
16 domestic dispute or, you know, an assault or
17 something like that, kind of following up on
18 Justice Breyer's hypotheticals or questions to
19 you, would Bivens apply in that circumstance?

20 MS. HARRIS: I don't think so. I
21 think you could certainly argue the national
22 security implications might be different in that
23 case, but I would still be arguing that Bivens
24 does not apply in that circumstance for all of
25 the other special factors I've mentioned, and I

1 would like to also flag alternative remedies are
2 really important in this context.

3 Again, the Court's test is, is there
4 any single reason to doubt the need -- to think
5 Congress would doubt the need for a Bivens
6 remedy. And, in your particular context, the
7 Border Patrol agent is still going to be someone
8 where there's the possibility of Federal Tort
9 Claims Act liability and a whole raft of
10 administrative remedies and other potential
11 outlets for someone to vindicate their interests
12 in making sure their constitutional rights
13 aren't violated.

14 JUSTICE KAGAN: Sorry. So, other than
15 the alternative remedies, your answer to Justice
16 Barrett's question is sort of across the board
17 Bivens doesn't apply to Border Patrol agents,
18 and if I could just hear again why that is?
19 What do you think the special factors are that
20 make all Border Patrol agents in every context
21 doing any particular -- any function different?

22 MS. HARRIS: Sure. I think it's a mix
23 of things. Now, again, I think it's easiest at
24 the border where the national security
25 implications, I think, Hernandez has already

1 recognized --

2 JUSTICE KAGAN: But you would extend
3 it even if the Border Patrol agent was not at
4 the border?

5 MS. HARRIS: Yes. And that is
6 correct, and that is because I think the
7 cross-cutting reasons against Bivens extensions
8 make it a very difficult sale. I think that one
9 of the questions --

10 JUSTICE KAGAN: So, again, what are
11 those -- what are those reasons?

12 MS. HARRIS: Sure. Happy to go
13 through them, first of which is just the
14 doctrinal foundation, so is there reason to
15 doubt -- to think Congress wouldn't want a
16 remedy in which there is a separation-of-powers
17 violation that --

18 JUSTICE KAGAN: Well, but that just
19 begs the question, I mean, why would Congress --
20 I mean, the question is, like, what's different
21 about this very large class now that you're
22 demarcating?

23 MS. HARRIS: Sure. And I think the
24 second question is whether the judiciary is
25 well-suited to weigh the costs and benefits for

1 the -- and the cross-cutting effects on the
2 Border Patrol in recognizing such claims,
3 including whether it -- whether Border Patrol
4 agents are sort of implementing overlapping
5 functions.

6 Sort of at one moment, perhaps they
7 think a search is initially perhaps something
8 more akin to a routine law enforcement search.
9 It becomes an immigration enforcement action. I
10 think there are pretty hard questions about how
11 it's going to affect --

12 JUSTICE KAGAN: I mean, but don't all
13 -- all law enforcement officers -- you know,
14 they do what's needed, and sometimes they're
15 going to do something that's not strictly in the
16 wheelhouse and sometimes they're going to -- I
17 mean, that -- that would apply to everybody,
18 wouldn't it, that, you know, they -- you know,
19 there's a -- just a cop on the beat and he might
20 be doing border patrol someday too.

21 MS. HARRIS: I think it's particularly
22 acute with respect to the border patrol, but I
23 do think that this illustrates, again, the level
24 of generality that Abbasi and Hernandez have now
25 pick -- pitched the inquiry, which is really

1 separation-of-powers concerns have to be at the
2 absolute forefront and is the answer to the
3 question are courts ever well-suited to figure
4 out the systemic costs on an agency, including
5 morale, deterrent effect, administrative costs,
6 and --

7 JUSTICE KAGAN: Well, with respect, it
8 does seem like, you know -- you know, what --
9 when Justice Breyer was a little bit making fun
10 of this, like, you know, on Tuesday and Thursday
11 but not Wednesday and Friday, I mean, it seems
12 that that's what you're saying, that we sort of
13 focus Bivens at this unbelievably minute level
14 of detail and find out exactly what Bivens was
15 about and say, oh, sorry, it doesn't apply
16 because it's Tuesday rather than Monday or it's
17 April rather than May.

18 MS. HARRIS: Well, I respectfully
19 disagree with that. I do think we're trying to
20 faithfully apply exactly what Abbasi says. So I
21 think the question is how do you distinguish
22 between trivial differences and differences that
23 are meaningful from Bivens and which, again,
24 we're not challenging the stare decisis and
25 settled law value of Bivens. And so I think

1 that question really is answered by the Abbasi
2 new context inquiry, which the Court has said is
3 broad and easily satisfied.

4 And so I think that has to be the
5 answer in order to be faithful to what the Court
6 has already said in this context.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas?

10 JUSTICE THOMAS: No questions.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer, anything further?

13 Justice Alito? No?

14 Justice Gorsuch, anything further?

15 Justice Barrett? No?

16 Thank you, counsel.

17 Mr. Huston.

18 ORAL ARGUMENT OF MICHAEL R. HUSTON
19 FOR THE UNITED STATES, AS AMICUS CURIAE,
20 SUPPORTING THE PETITIONER

21 MR. HUSTON: Mr. Chief Justice, and
22 may it please the Court:

23 A straightforward application of this
24 Court's recent Bivens precedents demonstrates
25 that the judgment of the court of appeals should

1 be reversed. At step 1 of Abbasi's framework,
2 both of Respondent's claims would require
3 extending Bivens to new contexts for the first
4 time in 40 years, and at step 2, multiple
5 special factors counsel hesitation against the
6 Court taking that momentous step.

7 On the First Amendment, this Court has
8 explained that retaliation claims are easy to
9 allege and hard to disprove and that they have
10 the potential to chill federal officers'
11 performance of important functions. That is
12 especially true here, where Respondent seeks to
13 impose liability for Agent Egbert's giving of a
14 tip to another agency suggesting further
15 investigation.

16 And on the Fourth Amendment,
17 Respondent's claim is meaningfully different
18 from the ones in Bivens in ways that bear
19 directly on the separation of powers. This
20 Court has recognized that agents' effective
21 policing of the border has a clear and strong
22 connection to national security, and Congress
23 has also determined that law enforcement at the
24 border is different from other kinds of law
25 enforcement.

1 All those features give ample reason
2 to doubt that Congress would have wanted an
3 individual damages remedy in the circumstances
4 here.

5 I'd like to begin --

6 JUSTICE THOMAS: Following up on the
7 questions that Ms. Harris was confronted with,
8 do you think that there is a meaningful
9 difference between Border Patrol agents and
10 narcotics agents?

11 MR. HUSTON: I think that Border
12 Patrol agents do present a new context, Your
13 Honor, at step 1 of Abbasi, but I think whether
14 special factors counsel hesitation and, thus,
15 whether a Bivens claim can go forward depends on
16 what the Border Patrol agents are doing.

17 So I think this goes directly to the
18 question that -- that Justice Barrett posed
19 about what about a situation where a federal
20 officer performs some duties that do implicate
21 national security and others that don't.

22 We do think that that makes a very
23 important difference, and we think that the --
24 the facts here present a very clear and strong
25 connection to national security, similar to what

1 was at issue in Hernandez. That's why a Bivens
2 claim cannot go forward here.

3 We think the case would be different
4 if you had a Border Patrol agent who's just
5 investigating -- you know, assisting with local
6 law enforcement to perform routine law
7 enforcement functions.

8 JUSTICE BREYER: Well, after 9/11,
9 there were quite a few local policemen, I
10 believe, as well as FBI agents and federal
11 police, in New York City looking for terrorists,
12 which is certainly a national law enforcement
13 function.

14 So is it the position of the Solicitor
15 General and the government that if any of those
16 normal agents that fall under Bivens, FBI, I
17 take it, ordinary police, et cetera, federal
18 police officials, if they had beaten somebody
19 over the head unreasonably and acted contrary to
20 the Constitution, there would be no Bivens
21 action?

22 MR. HUSTON: Yes, there would be no
23 Bivens action in --

24 JUSTICE BREYER: So any time -- so
25 Bivens is not simply -- I'd never heard of that

1 one. But you're saying that just -- who are the
2 most ordinary people that Bivens applies to? I
3 thought FBI agents.

4 MR. HUSTON: I think it is FBI.

5 JUSTICE BREYER: I thought DEA agents
6 too. I was wrong about that?

7 MR. HUSTON: There are many claims
8 brought against -- there are some claims brought
9 --

10 JUSTICE BREYER: Yeah, DEA. Okay. I
11 thought --

12 MR. HUSTON: -- against DEA agents,
13 but the most common one --

14 JUSTICE BREYER: And I thought --

15 MR. HUSTON: -- is the FBI marshals.

16 JUSTICE BREYER: -- alcohol, tobacco
17 and so forth. I thought those were just right
18 at the heart of Bivens.

19 MR. HUSTON: Sure. Your Honor --

20 JUSTICE BREYER: Okay. So now they
21 have the same job basically if you look at it in
22 terms of arresting people for violations of
23 federal law. They have the same authority to
24 carry weapons. They have the same whatever.
25 They -- they have the -- what's the word -- they

1 have the same basic obligation providing police
2 protection.

3 But you are saying all those people to
4 whom Bivens now applies, if the person they are
5 arresting is a person who has a connection with,
6 let's say, foreign dubious groups abroad, no
7 Bivens action?

8 MR. HUSTON: Yes, that's right, Your
9 Honor. And I think this --

10 JUSTICE BREYER: Would you call that a
11 extension of Bivens or a drawing back of what
12 people thought Bivens was about?

13 MR. HUSTON: I think Abbasi explained
14 that when an officer is operating pursuant to a
15 different statutory or legal mandate, that does
16 give rise to a new context at some point.

17 JUSTICE BREYER: Oh, no, this is --

18 MR. HUSTON: It doesn't --

19 JUSTICE BREYER: -- the same mandate,
20 the FBI. The same mandate, the DEA. They see a
21 person walking down New York City with a bomb,
22 okay, and so they arrest him, and in the course
23 of that arrestment -- arresting him, they do
24 something that's shocking or contrary to the
25 Constitution, and that person with the bomb is

1 connected with somebody in a foreign country.

2 And you're saying that person with the
3 bomb has no Bivens action?

4 MR. HUSTON: That's correct, Your
5 Honor. I think that's illustrated by the
6 Court's opinion in Abbasi, where the Court
7 talked about the difference between conditions
8 of confinement claims like the ones that were at
9 issue in Carlson and confinement claims like the
10 ones that were at issue in Abbasi.

11 And the Court said the key difference
12 is that Abbasi was a case about national
13 security dissension, and that made all the
14 difference, even though, at one level of
15 generality --

16 JUSTICE KAGAN: And -- and how is this
17 a case about national security? I mean, Justice
18 Breyer gave you one hypothetical, but this is a
19 much more prosaic case. I mean, the -- the --
20 the agent goes in and goes onto somebody's
21 private property and, essentially, it's to check
22 on the status of a guest, the immigration status
23 of a guest. Are you legally in this country or
24 not?

25 I mean, what does that have -- you

1 know, sure, you know, borders have something to
2 do with national security, but every time an --
3 a border agent checks on immigration status of a
4 person we kind of wave our arms and say national
5 security and say there's no Bivens remedy
6 because of that?

7 MR. HUSTON: Your Honor, the Court in
8 Hernandez said that the protection of the
9 border, the prevention of the unlawful entry of
10 persons and drugs and other contraband, has a
11 clear and substantial connection to national
12 security.

13 JUSTICE KAGAN: I mean, Hernandez --

14 MR. HUSTON: I think that's --

15 JUSTICE KAGAN: -- is a very different
16 kind of case, right? It's a cross-border
17 shooting, and, you know, it clearly had
18 implications for the relationship between the
19 United States and Mexico, you know.

20 So whatever you think of Hernandez,
21 there obviously was a dissent in that, but --
22 but assume -- you know, assume that the majority
23 was right. This is not Hernandez, is it?

24 MR. HUSTON: I agree that there's a
25 factual difference. The cross-border aspect of

1 Hernandez, which was important to the analysis,
2 is not present here. That's certainly true.
3 But if I might just say two things about why I
4 think there are other features of Hernandez that
5 go --

6 JUSTICE KAGAN: Canada is not going to
7 much care whether this border agent went on
8 to -- you know -- you know, checked out this
9 guy's citizenship or -- or legality in the --

10 MR. HUSTON: Your --

11 JUSTICE KAGAN: -- country.

12 MR. HUSTON: -- Your Honor, I very
13 respectfully but very vigorously disagree with
14 that. The -- the -- the agents at -- who work
15 at the border in Blaine will tell you that their
16 most important partnership is with the Royal
17 Canadian Mounted Police. We work together with
18 them to police our shared border. They protect
19 their side for our benefit. We protect our side
20 for their benefit. And it's that mutual
21 cooperative relationship, which involves daily
22 type of liaising, that really is what enables us
23 to protect the border.

24 So I do think that if you have a
25 situation like the one that Hernandez was

1 concerned about, where the prospect of Bivens
2 liability chills border agents' performance of
3 their duties, that is something that affects
4 Canada in a very real way. It means more people
5 are sneaking across the border into Canada.

6 But it's not just about preventing
7 people from going into Canada. Agent Egbert was
8 on the property that day because the Turkish
9 guest had undertaken objectively suspicious
10 travel across the world to stay at a rundown
11 bed-and-breakfast at a site that is notorious
12 for cross-border smuggling.

13 Again, the agents who deal with this
14 property, it is a constant headache. They've
15 had years where there have been multiple
16 incidents per week of people coming across the
17 border into the United States from Canada.

18 And the agent suspected that day that
19 that's why the Turkish guest was there, to
20 facilitate the unlawful entry of persons or
21 drugs or other things across the border into the
22 United States or potentially to smuggle himself
23 or other contraband --

24 JUSTICE KAGAN: That's what the --

25 MR. HUSTON: -- outside the United

1 States.

2 JUSTICE KAGAN: -- agent says, but
3 this is a summary judgment motion where we take
4 the facts not as the agent says, right? And --
5 and, if you do that, all that this is, is an
6 unremarkable check as to whether a guest was
7 lawfully in the country.

8 MR. HUSTON: Well, Your -- Your Honor,
9 I think we're happy to take the facts in the
10 light most favorable to Respondent, but, again,
11 the Fourth Amendment creates an objective
12 standard of reasonableness, and I think the
13 facts here gave ample reason for an objective
14 suspicion that this guest was involved in
15 cross-border smuggling activity.

16 And, again, I think Hernandez said
17 that cross-border smuggling activity, preventing
18 the unlawful entry of persons and drugs, has a
19 clear and substantial connection to national
20 security. I think the Court was exactly right
21 about that.

22 And, for the reasons I mentioned, I
23 also think that agents' effective performance of
24 their duties at the border does make a very
25 significant difference to our foreign partners,

1 to our Canadian partners.

2 JUSTICE BARRETT: Mr. Huston --

3 CHIEF JUSTICE ROBERTS: Mr. Huston,
4 give me a hypothetical case where your office
5 would say Bivens permits a cause of action.

6 MR. HUSTON: Sure, Your Honor. In a
7 case involving an FBI agent or an agent of the
8 Park Police or the Marshals Service, something
9 other than the Federal Bureau of Narcotics or
10 its successor, the DEA, but that is a routine
11 domestic search-and-seizure claim or a excessive
12 force claim, the government has not argued
13 either before or after Abbasi that those cases
14 give rise to special factors.

15 Now, of course, the list of things
16 that can create special factors, as Abbasi
17 explained, is non-exhaustive, and so the Court
18 really needs to consider the full picture. It
19 makes a difference if the FBI agent is there, in
20 Justice Breyer's hypothetical, to protect
21 national security, to go after a guy with a
22 bomb. And it makes a difference if you're
23 trying to prevent the enter -- entry of drugs or
24 -- or illegal persons at the border.

25 But, in a -- in that sort of routine,

1 run-of-the-mill Fourth Amendment case by an FBI
2 agent, we don't see special factors that counsel
3 --

4 JUSTICE BARRETT: Mr. --

5 CHIEF JUSTICE ROBERTS: It's a special
6 factor if drugs -- drugs are involved?

7 MR. HUSTON: Well, in -- no, I'm
8 sorry, Your Honor, not just the drugs. Drugs
9 were, of course, the basis for the investigation
10 in Bivens itself, but it's a special factor if
11 you are protecting the border because it's --
12 it's a special factor anytime the agent's
13 statutory mission is to protect national
14 security. And the Court has explained that
15 cross-protect -- effective protection of the
16 border implicates directly national security.

17 JUSTICE GORSUCH: Mr. Huston, if I
18 understand your response to the Chief Justice,
19 cases identical to Bivens, the government
20 concedes and the -- and the three cases we've
21 recognized are -- are permissible, but anything
22 beyond that we're going to have to do special
23 factors. Is that a fair characterization?

24 MR. HUSTON: Yes, it is, Your Honor.
25 And can I -- can I -- I would just like to say

1 one word about why I think that's the right way
2 to approach it. That's because I think step 1
3 of the two-step analysis is really just designed
4 to perform a quick check to make sure that there
5 are or are not special factors.

6 And it's really at the step 2 that the
7 Court performs the full analysis. And you can
8 see this in both the application of the test in
9 Abbasi and Hernandez, where the discussion of
10 whether the context was new was very, very
11 brief. Most of the analytical work was being
12 done at step 2 on special factors, and that took
13 --

14 JUSTICE GORSUCH: Which is why you
15 think it was appropriate for the Ninth Circuit
16 to go to step 2 in this case?

17 MR. HUSTON: Absolutely. We think
18 these -- these contexts are clearly new, both of
19 them, Your Honor, and -- but we also, of course,
20 you know, respectfully disagree with the Ninth
21 Circuit's conclusion that there are not special
22 factors in this case. So --

23 JUSTICE KAVANAUGH: When you get to
24 step 2, can you imagine a case where it would
25 ever be the situation where the special factors

1 would not apply?

2 MR. HUSTON: Yes. I -- I think it's
3 the answer --

4 JUSTICE KAVANAUGH: What would be an
5 example of that?

6 MR. HUSTON: I think it's the answer I
7 gave to the Chief Justice. In a routine
8 domestic search-and-seizure context or an
9 excessive force claim involving a U.S. citizen
10 by an FBI agent, that passes step 1, it's a new
11 context because that agent has a different
12 mission than the agent in Bivens.

13 But we would not argue that there are
14 special factors counseling hesitation unless the
15 case has facts like it implicates national
16 security or something like that.

17 JUSTICE GORSUCH: Is -- is it --

18 JUSTICE BARRETT: Mr. Huston, can I
19 ask --

20 JUSTICE GORSUCH: Go ahead.

21 JUSTICE BARRETT: -- a question about
22 the government's position on the level of
23 generality at which we analyze new contexts? So
24 you've gotten a lot of questions about, well,
25 would this count, would that count.

1 Would it be the position of the United
2 States that after *Abbasi* we should construe the
3 new context against recognizing so that we would
4 expect a very, very close fit, maybe not the
5 Tuesday/Thursday, Monday/Wednesday examples that
6 Justice Breyer was giving you, but is it the
7 position of the United States that essentially
8 the Court has said that *Bivens* remedies are so
9 disfavored that we should always err on the side
10 of narrowness? Is that the position of the
11 United States?

12 MR. HUSTON: I think that's basically
13 right, Your Honor. I think it follows directly
14 from the Court's statements in *Abbasi* that a new
15 context is broad and that even a minor extension
16 still qualifies as an extension.

17 But I -- I actually think the
18 skepticism of *Bivens* is -- is just as important
19 at step 2. We think that the institutional
20 competence of the courts, the fact that creating
21 a cause of action is fundamentally a legislative
22 function, not an exercise of the judicial power,
23 mean that any extension of *Bivens* is disfavored,
24 and, thus, when the Court is conducting a step 2
25 analysis, it should be quite skeptical before it

1 recognizes new cause -- new Bivens causes of
2 action.

3 JUSTICE BREYER: Well, yes, but you're
4 defining -- that wasn't quite the question, I
5 thought, that -- that you were asking, Justice
6 Barrett.

7 She was saying, all right, we see a
8 new factor or could be a new factor, could not.
9 Should we approach it with skepticism as to
10 whether it is a new factor or not?

11 Now, there, why is skepticism
12 justified? It can't be because -- see, if it
13 isn't a new factor, it falls within what has
14 already been recognized as something that was --
15 Congress either wanted or at least permitted, et
16 cetera.

17 The reason I ask that is Justice
18 Harlan's opinion in Bivens, which I think is
19 interesting, traces Bivens the right for a court
20 to have such a -- a rule way, way back, back to
21 really the common law, back to England, back to
22 -- and to John Marshall in -- in -- and --
23 and -- and so what's the reason -- and John --
24 John Marshall in Marbury versus Madison, you
25 know, rights and remedies and so forth.

1 So I got your point, don't extend it.
2 But I haven't got your point of whether we
3 consider the differences here in this case
4 something that would be extending it or not to
5 recognize it would be narrowing it? How do we
6 do that?

7 MR. HUSTON: Well --

8 JUSTICE BREYER: And why favor the
9 one? Why have the presumption one way rather
10 than the other? That's a little elaboration of
11 what I took as --

12 MR. HUSTON: The Court has said that
13 its conception of what makes something a new
14 Bivens context is broad and that even a modest
15 extension is still an extension. And the reason
16 for that is because the -- Justice Harlan in
17 dissent in Bivens -- or, I'm sorry, not --
18 Justice Harlan's concurring opinion in Bivens
19 and the great Chief Justice's opinion were
20 referring to common law remedies for common law
21 injuries.

22 And that's very different, as this
23 Court has explained, from a federal court,
24 which, of course, doesn't create general common
25 law.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas?

4 JUSTICE THOMAS: Nothing.

5 CHIEF JUSTICE ROBERTS: Anything
6 further, Justice Breyer? No?

7 Justice Alito? No?

8 Justice Gorsuch?

9 Justice Barrett? No?

10 Thank you, counsel.

11 Ms. Ellsworth.

12 ORAL ARGUMENT OF FELICIA H. ELLSWORTH

13 ON BEHALF OF THE RESPONDENT

14 MS. ELLSWORTH: Mr. Chief Justice, and
15 may it please the Court:

16 Mr. Boule's Fourth Amendment claim is
17 materially indistinguishable from Bivens itself.
18 A federal law enforcement agent entered private
19 property without a warrant and used excessive
20 force, just like the federal agents in Bivens,
21 as the Court's questions have indicated.

22 The fact that the federal agent
23 inquired about the visa status of Mr. Boule's
24 guest in the process does not make this case any
25 different from the other instances of law

1 enforcement overreach in the search-and-seizure
2 context in which this Court has long recognized
3 that a Bivens remedy lies.

4 And this case has none of the foreign
5 policy or extraterritoriality concerns that
6 animated the Court's decision in Hernandez.
7 Instead, this is a case like the Court observed
8 in -- in Abbasi, where Bivens has continuing
9 force and even necessity.

10 Mr. Boule's First Amendment claim
11 addresses conduct that is similar to the conduct
12 that this Court assumed in Hartman versus Moore
13 could be remedied via Bivens, but even if it is
14 a new context, there is no reason to withhold
15 the remedy here.

16 There's no national security
17 considerations, no conceivable national security
18 considerations with regard to the First
19 Amendment claim, and no alternative
20 administrative remedial scheme that exists.

21 Awarding damages for federal
22 officer -- individual damages for federal
23 officer misconduct has long-standing roots
24 dating back to the founding and remains
25 appropriate, albeit more limited, today.

1 And as the Court has observed on
2 several occasions, Congress in the Westfall Act
3 preserved the availability of individual damages
4 for constitutional violations.

5 Although the reach of Bivens may be
6 narrow, the need for the remedy persists, and
7 the argument that the Court should not recognize
8 a Bivens remedy in any new case flies in the
9 face of this Court's decision just five terms
10 ago in Abbasi and also would contravene the
11 historical foundations allowing individual
12 damages to right a federal officer's
13 constitutional wrong.

14 Mr. Boule's case sat -- claims satisfy
15 the framework set forth in Abbasi and should be
16 allowed to proceed.

17 I'd welcome the Court's questions.

18 JUSTICE THOMAS: But aren't -- aren't
19 you up against the fact that we have declined to
20 apply or extend Bivens in recent history? We've
21 almost universally declined to expand it in --
22 into new contexts?

23 MS. ELLSWORTH: That's -- that's
24 correct, Justice Thomas. And we don't think
25 this is a new context for all the reasons that

1 some of the Court's questions of my friend
2 indicated. This is an unlawful entry without a
3 warrant, and this is excessive force on private
4 property against a U.S. citizen on domestic
5 soil.

6 None of the reasons that the Court has
7 found would be a Bivens extension in any prior
8 cases apply here. And even if the Court were to
9 go to the next step, none of the reasons that
10 have been offered that might counsel hesitation
11 would be a reason to withhold a Bivens remedy
12 here or to think that Congress would not want a
13 damages remedy in this instance.

14 JUSTICE KAVANAUGH: What about Mr.
15 Huston's reference to Canada and the cooperation
16 with Canada, so this is the border context and
17 it's not just near the border, but there
18 actually is interaction with the Canadian
19 authorities on this kind of activity?

20 MS. ELLSWORTH: So a -- a couple
21 responses to that, Justice Kavanaugh.

22 First of all, I -- I hear the
23 government and -- and Petitioner to be saying
24 that the actual proximity to the border doesn't
25 matter to the position here, that, in fact, the

1 position is that Border Patrol agents writ large
2 should not be subjected to Bivens. So I don't
3 think this actual proximity and the cooperation
4 with Canada is -- is particularly relevant here.

5 Agent Egbert would take the position
6 that this conduct is not subject to Bivens if it
7 happened 20 miles away because of the
8 immigration-related context that supposedly
9 applies.

10 And that, to Justice Breyer's
11 questions, the 83 agencies, the 5,500-mile land
12 border with Canada, the idea that Bivens doesn't
13 apply anywhere in that swath would sweep with
14 far too broad a brush.

15 Now I think it is possible -- and the
16 Court's decision in Hernandez, of course,
17 recognizes this -- that there are certain
18 functions that may be performed by Border Patrol
19 agents which may create a new context or may be
20 a -- a reason counseling hesitation, but not
21 every function performed by a Border Patrol
22 agent falls into that category, and the conduct
23 of Agent Egbert here certainly does not.

24 JUSTICE BARRETT: Ms. Ellsworth, what
25 if this had happened -- you know, Smuggler's Inn

1 was very, very close to the border. What if
2 this exact same encounter at which Boule alleges
3 there was excessive force had happened not on
4 his property but right next to the border? What
5 then?

6 MS. ELLSWORTH: So, as a -- as a
7 factual matter, his property is right next to
8 the border.

9 JUSTICE BARRETT: He is next to the
10 border? Okay.

11 MS. ELLSWORTH: It's about 10 feet
12 away.

13 JUSTICE BARRETT: But, like, what if
14 -- what if we push it up, like, right, right by
15 the border, it's not his driveway, it's right,
16 right by the border? Does -- does that change
17 things for you?

18 MS. ELLSWORTH: I don't think it does,
19 Your Honor, I really don't, because the -- the
20 -- the conduct that the agent was engaged in
21 here was ordinary law enforcement conduct. He
22 was following up on a tip given to him by Mr.
23 Boule to come and inquire about the -- or talk
24 to this Turkish guest.

25 And once that -- once he followed up

1 on that tip, if you look at Joint Appendix 108,
2 the agent left. There was no further concern,
3 no further sort of exigency at the moment.

4 So I don't think what -- how -- the
5 proximity to the border makes a difference.

6 JUSTICE BARRETT: So what would he
7 have to do for Bivens not to apply?

8 I mean, the -- you know, Boule has
9 been involved in smuggling activity in the past.
10 His -- his B&B is called Smuggler's Inn. His
11 license plate says "SMUGGLER." You know, there's
12 this Turkish national who's staying and there's
13 suspicion that he's going to, which, in fact, he
14 did, cross the border into Canada illegally, and
15 -- and this is what Agent Egbert is following up
16 on.

17 What would have to be present? Can
18 you give me a set of facts in which Bivens then
19 would not apply?

20 MS. ELLSWORTH: Certainly, and I think
21 it's the Hernandez case, at least is one
22 example. It's actively patrolling the border,
23 attempting to prevent illegal entry, right?
24 That's what Agent Mesa was doing in Hernandez.
25 That is one of the factors that the Court found

1 convincing as to why Bivens shouldn't apply
2 there, although the extraterritoriality and the
3 foreign relations concerns played a far larger
4 role at least in the Court's opinion.

5 JUSTICE SOTOMAYOR: What --

6 JUSTICE GORSUCH: Counsel -- oh, go
7 ahead, please.

8 JUSTICE SOTOMAYOR: What I find so
9 strange about this case is that Mr. Boule is the
10 one who told the agent about this visitor,
11 didn't he?

12 MS. ELLSWORTH: That's correct,
13 Justice Sotomayor.

14 JUSTICE SOTOMAYOR: And --

15 MS. ELLSWORTH: Mr. Boule was a
16 government informer -- informant for ICE.

17 JUSTICE SOTOMAYOR: Assuming that
18 that's public knowledge now. And so -- and I
19 think that Mr. Boule told him he was coming from
20 a -- from an airport, correct?

21 MS. ELLSWORTH: That's correct. He
22 told him he had flown into the country at
23 Kennedy Airport in New York and was arriving in
24 the area at Seattle Tacoma.

25 JUSTICE SOTOMAYOR: All right. I

1 still don't understand why the agent had to wait
2 until the car got to the inn, why he couldn't,
3 if he was curious, have stopped the car
4 anywhere?

5 MS. ELLSWORTH: Well, that's exactly
6 right, Justice Sotomayor. He could have stopped
7 the car outside of the property. He could have
8 stopped the car on the way from the airport. As
9 Justice Barrett's question indicated, the car
10 has a distinctive license plate. Agent Egbert
11 was familiar with it. There was no need to
12 enter the property in order to conduct the visa
13 check.

14 JUSTICE SOTOMAYOR: So I guess your
15 answer is really that whatever the writ large
16 activity of an agent is, we should be looking at
17 what the activity was in this case?

18 MS. ELLSWORTH: I think the specific
19 activity is something the Court has typically
20 considered in -- in Bivens, the Bivens context
21 in order to --

22 JUSTICE SOTOMAYOR: And so, as you see
23 the activity, it's not smuggling; it's an
24 immigration violation?

25 MS. ELLSWORTH: Exactly. It has

1 nothing to do with alleged smuggling, and, of
2 course, as I noted, Mr. Boule was cooperating
3 with the government rather than in opposition to
4 it.

5 But, if the fact that the agent is
6 conducting a visa check is sufficient to remove
7 the conduct from the ambit of Bivens altogether,
8 that would have extremely broad implications far
9 beyond border patrol. I mean --

10 JUSTICE ALITO: What if it happened
11 right at the border? Suppose that someone runs
12 across the border carrying a big bag of drugs,
13 and a Border Patrol agent sees that person and
14 then tackles the person and allegedly uses
15 excessive force in detaining the person.

16 What would you say about that?

17 MS. ELLSWORTH: That case would be
18 much more similar to the conduct in Hernandez.
19 And, again, the agent would be actively both
20 stationed at the border, right, stationed at a
21 checkpoint of some sort, but also attempting to
22 prevent illegal entry, right?

23 That is the difference in the -- if
24 we're talking about the law enforcement conduct,
25 that is one of the differences between what was

1 -- Agent Mesa was doing in Hernandez and Agent
2 Egbert --

3 JUSTICE ALITO: Well, how -- okay.
4 How about if it's the other way? This person is
5 running toward Canada, and the Border Patrol
6 agent tackles the person two feet from the
7 Canadian border.

8 MS. ELLSWORTH: Again, I think it
9 would depend on whether the agent was actually
10 stationed at the border, attempting to prevent
11 unlawful entry and exit. That's not the
12 circumstance here, but I think that would be a
13 closer case because, again, that is an
14 individual Border Patrol agent who's actively
15 engaged in trying to stop cross-border conduct,
16 crime, whatever you call it.

17 That's very different from a law
18 enforcement officer who comes onto somebody's
19 property following up on a tip and then, as the
20 allegations of the -- the case reached this
21 Court, engages in excessive force. It's a
22 different --

23 JUSTICE ALITO: At -- at what point do
24 you think he -- this is not the Bivens question,
25 but just to understand the background of this,

1 at what point do you claim the agent violated
2 your client's Fourth Amendment rights? This is
3 a public accommodation, right? So --

4 MS. ELLSWORTH: So --

5 JUSTICE ALITO: -- presumably, anybody
6 can walk up to the door of it. Wouldn't that be
7 the case?

8 MS. ELLSWORTH: The district court
9 found, at the Petition Appendix 65a, that the
10 area where Agent Egbert attempted to question
11 the Turkish guest, where he was standing and
12 where Mr. Boule asked him to leave, was the
13 curtilage of the property, which is protected
14 within the Fourth Amendment. It is an area very
15 similar to the area that the Court found in the
16 Collins versus Virginia case was curtilage
17 protected by the Fourth Amendment as well.

18 So I -- that is what -- the initial
19 Fourth Amendment violation is that area, the
20 fenced-in area right in front of the front door
21 of Mr. Boule's home --

22 JUSTICE ALITO: Well, I mean, suppose
23 --

24 MS. ELLSWORTH: -- which is also --

25 JUSTICE ALITO: -- he wanted to -- to

1 rent a room there. He can -- he could enter,
2 right? He could walk up to the door to enter.
3 Suppose he wanted to speak to a guest. I mean,
4 this is not -- I'm just trying to -- this seems
5 like not the biggest Fourth Amendment case that
6 we've -- we've ever seen.

7 MS. ELLSWORTH: So -- so let me give a
8 few responses, Justice Alito.

9 First of all, the -- the district
10 court found that this was curtilage. That was
11 not disturbed on appeal by the Ninth Circuit.
12 So I don't think that question is before the
13 Court. But taking the question --

14 JUSTICE ALITO: Well, I don't know
15 that the issue is whether it's curtilage or not
16 because it's a commercial establishment. But go
17 ahead.

18 MS. ELLSWORTH: Take -- taking the
19 question, when Agent Egbert was in this area of
20 the property and Mr. Boule asked him to leave,
21 that is the moment --

22 JUSTICE ALITO: Yeah. Okay.

23 MS. ELLSWORTH: -- at which the search
24 became an unlawful search.

25 JUSTICE ALITO: Okay.

1 JUSTICE GORSUCH: Counsel --

2 JUSTICE KAGAN: Can I take you back to

3 --

4 JUSTICE GORSUCH: Oh, please. No, go
5 ahead.

6 JUSTICE KAGAN: -- Justice Kavanaugh's
7 question about U.S./Canada relations? And, as I
8 understood it, the way you responded to him is,
9 look, Petitioner's view would extend far beyond
10 the border, just anytime a Border Patrol agent
11 is involved.

12 But how about if we narrowed
13 Petitioner's view and we said, okay, it's Border
14 Patrol agents acting near the border? Does that
15 have implications almost as a matter of
16 necessity for U.S./Canada relations?

17 MS. ELLSWORTH: I don't think it does
18 as a matter of necessity. It's going to -- it's
19 going to depend on the facts because not all
20 Border Patrol agents are engaged in conduct that
21 is actively protecting the border at all times.
22 The mission of the Border Patrol is much broader
23 than that, and there are Border Patrol agents
24 who at various times, as Justice Breyer's
25 question to my friend indicated, are engaged in

1 normal domestic law enforcement activities.

2 So it does -- it depends on the
3 activity that the agent is involved in. And I
4 would just note --

5 JUSTICE KAGAN: And why does this
6 activity fall on one side of the line rather
7 than the other side of the line?

8 MS. ELLSWORTH: Because, again, the
9 agent was following up on a tip. That's normal
10 law enforcement activity. The fact that the
11 tip, though --

12 JUSTICE KAGAN: Well, doesn't it make
13 a difference what the tip was about?

14 MS. ELLSWORTH: Well, and the fact
15 that the tip related to -- first of all, the tip
16 was, I have a legal -- you know, somebody who's
17 legally in the country coming to my property.
18 So there's some factual dispute here or -- or
19 lack of clarity that would need to be decided by
20 a fact finder. As Your Honor noted, this comes
21 to the Court on summary judgment.

22 But, more importantly, if immigration
23 related -- if following up on somebody's
24 immigration status were sufficient to remove
25 conduct from the ambit of Bivens, that would --

1 that -- that sweeps every federal agent, that
2 sweeps local agents, state agents. I mean,
3 immigration checks are something that are
4 extremely common.

5 JUSTICE KAVANAUGH: But, here, it's a
6 tip, to follow up on Justice Kagan's questions,
7 a tip about someone who's present, and the
8 officer, exercising experience, says, well, this
9 person staying there is likely to cross the
10 border or possible to cross the border into
11 Canada. So it's an illegal crossing, although
12 in the opposite direction of the cases that the
13 Border Patrol is usually dealing with. And that
14 goes back to the Canada/U.S. cooperation.

15 But this is not just an illegal
16 presence case. It seems to me, from the
17 officer's perspective, it's an illegal crossing
18 investigation or a potential illegal crossing.

19 MS. ELLSWORTH: So a few responses to
20 that, Justice Kavanaugh.

21 First of all, the -- the record belies
22 that claim, right? At Joint Appendix 108, the
23 agent came. Once he had checked the visa, he
24 said our job there was done as Border Patrol
25 agents and left.

1 The second point I would make is,
2 unlike in Hernandez, we do not have the
3 government of Canada before this Court
4 indicating that they disagree with the position
5 taken by the lower courts or the position taken
6 by the agency. And the animating -- the foreign
7 relations animating factor in Hernandez, at
8 least as I read it, related to the -- the -- the
9 problem with foreign relations that it would
10 create for a court, this Court, to somehow
11 contradict the judgment that the executive had
12 made.

13 But the third point I would make is --
14 JUSTICE ALITO: But, in Hernandez --
15 JUSTICE KAGAN: So it's obvious --
16 JUSTICE ALITO: -- the -- the
17 government of Mexico did not object to having
18 that suit go forward.

19 MS. ELLSWORTH: No, the government of
20 Mexico, of course, as -- as the Court --

21 JUSTICE ALITO: Uh-huh. Okay.

22 MS. ELLSWORTH: -- is well aware was
23 -- was supporting the availability of Bivens,
24 but that would have been in contravention of the
25 executive's decision not to discipline Officer

1 Mesa.

2 JUSTICE KAGAN: I mean, I would think
3 it's obviously true that, you know, Prime
4 Minister Trudeau is not sitting up late thinking
5 about this case. But is -- is that what's
6 required?

7 MS. ELLSWORTH: Something more than
8 the fact of it being proximate to Canada, I
9 think, has to be required for this Court to
10 think that foreign relations somehow come into
11 play. And there's no suggestion, even the
12 government's representation at argument today,
13 that there's any interest by the government of
14 Canada in this particular case or in the conduct
15 that Agent Egbert was involved in somehow being
16 remedied or not remedied.

17 And if it were sufficient that Agent
18 Egbert is a Customs and Border Protect --
19 Protection officer for that to eliminate the
20 availability of Bivens, none of this Court's
21 discussion in Hernandez would have been
22 necessary, right? That -- Agent Mesa was a CBP
23 officer as well, and the Court went to great
24 lengths to explain why it was that Bivens was
25 not available there.

1 It certainly wasn't sufficient either
2 that he was affiliated with CBP or even that the
3 conduct in question was so close to the border.
4 There were many more considerations that the
5 Court took into account.

6 JUSTICE GORSUCH: Counsel --

7 CHIEF JUSTICE ROBERTS: I think it's
8 important to keep in mind why we're asking all
9 these questions and I -- about the border, and
10 I -- I think we may have missed the sort of
11 important context.

12 It's not whether we think there's
13 going to be some, you know, connection to
14 international affairs but whether Congress,
15 given that context, would want there to be a
16 private right of action against a federal
17 officer but not enough to say something about
18 it.

19 In other words, we're wondering -- and
20 this is -- I -- I wonder if your friend on the
21 other side is -- is doing a little bit of double
22 counting. We start by saying there has to be
23 special considerations, but isn't one of the
24 special considerations the likelihood that
25 Congress would want their agents to be facing

1 this type of -- of liability, whether it's
2 something that's going to present a problem by
3 the -- at the border in -- in every case or not?

4 MS. ELLSWORTH: Well, let's talk about
5 what Congress has said here. We have two
6 indications to the extent that we can read --
7 read anything into them of what Congress thinks
8 about this.

9 The first is Section 1357(g)(8), which
10 subjects state officers who are deputized as --
11 as CBP officers to the same types of liability
12 and the same types of immunity as they would be
13 under federal law. So that's a suggestion by
14 Congress and understanding that there may well
15 be civil suits that arise out of conduct like
16 this.

17 The second indication that we have is
18 the Westfall Act, which, of course, doesn't
19 speak to the border context, but it does speak
20 to the fact that Congress has not seen fit to
21 eliminate the remedy of individual damages for
22 -- against constitutional violations for federal
23 officers.

24 CHIEF JUSTICE ROBERTS: Well, but, I
25 mean, the argument on the other side is that's

1 your alternative remedy, the Westfall Act.

2 MS. ELLSWORTH: And if the --

3 CHIEF JUSTICE ROBERTS: You don't need
4 a Bivens action.

5 MS. ELLSWORTH: If the Westfall -- if
6 the FTCA were sufficient to be an alternative
7 remedy, first of all, that would have to -- that
8 would contravene this Court's guidance in
9 Carlson and Malesko about the FTCA and Bivens
10 needing to co-exist.

11 But the second point I would make is
12 the Westfall Act explicitly exempts Bivens
13 actions. That's what the Court said in Hui
14 versus Castaneda, and the Westfall Act was
15 enacted against the backdrop of this Court's
16 Bivens jurisprudence at least as it existed in
17 1988, which was, respectfully, far broader than
18 it is today.

19 So, to -- to the extent we can read
20 anything into what Congress has done in the
21 Westfall Act, I think it -- it certainly doesn't
22 counsel against a Bivens remedy in this case in
23 the Fourth Amendment context.

24 JUSTICE GORSUCH: Counsel, if I
25 understand you correctly, you disagree with the

1 Ninth Circuit at the first step, is that right?

2 The Ninth Circuit said this is a new
3 context, and you say it is not a new context
4 because the actions of the officers here are
5 pretty similar to those in Bivens.

6 MS. ELLSWORTH: That's correct. The
7 Ninth Circuit found this to be a modest
8 extension. We respectfully submit that it's not
9 an extension of Bivens, and so the special
10 factors don't --

11 JUSTICE GORSUCH: Right.

12 MS. ELLSWORTH: -- need to be
13 considered.

14 JUSTICE GORSUCH: So I -- I -- I
15 guess, you know, part of my -- here's my big
16 concern. I'll lay it out.

17 We have a disagreement about the level
18 of generality we're supposed to apply at step 1,
19 whether this is or isn't a new context. And one
20 side argues that we should look at it more
21 broadly, perhaps you. This is more like Bivens
22 at a high level of generality. And the other
23 side tells us we have to get down to the
24 nitty-gritty, and -- and any deviation from any
25 specific thing is enough to create special

1 factors.

2 And then we go to the special factors,
3 and it's a whole list of disparate
4 considerations that are pretty hard to balance,
5 I think, we could all agree. And we're told
6 that, really, the agency matters, but, on the
7 other side, we're told no, it's the conduct that
8 matters in the specific case.

9 And, in between, it could be the
10 conduct that could potentially matter in those
11 circumstances that an officer entering might --
12 might face. It could be a law enforcement call
13 that turns into an immigration call or an
14 immigration call that turns into a law
15 enforcement call.

16 And then we're talk -- then we talk
17 about the border, and there, we know that if
18 it's a shot across the border, that's bad. But
19 the Smuggler's Inn, which has been disparaged in
20 its quality today --

21 MS. ELLSWORTH: Unfairly.

22 JUSTICE GORSUCH: -- unfairly, I'm
23 sure, is sufficiently far from the border that
24 it -- that it's okay, and then we -- well, then
25 we had a series of hypotheticals about, well,

1 what -- what if -- what if the driveway were a
2 little closer and -- and, you know -- or
3 whatever.

4 And I guess I'm just stuck, all right?
5 What -- what -- what is a good and faithful
6 judge supposed to try and do with all of this
7 mess, acknowledging the fact too that this Court
8 hasn't recognized a new Bivens action in
9 decades? As you say, the law was very different
10 in 1988 than it is today. Help.

11 MS. ELLSWORTH: So let -- let me do my
12 best, Justice Gorsuch.

13 I -- I think that the Court should
14 look to the guidance in Abbasi from five terms
15 ago, and I know that Hernandez is an intervening
16 case, but I think Hernandez is almost sui
17 generis given the facts of that case.

18 And if the Court looks at Abbasi, the
19 framework that was set out in Abbasi provides
20 the Court guidance for what to consider and how
21 to weigh that, and, in fact, one of the claims
22 in Abbasi against the individual jailers, as the
23 Court is aware, was sent back to the Second
24 Circuit to consider whether special factors
25 counsel hesitation.

1 So the Court did, in fact, recognize a
2 new context in Abbasi. It found that because
3 the claim was brought -- the conditions of
4 confinement claim was brought under the Fifth
5 Amendment rather than the Eighth Amendment, that
6 was a new context, a modest extension, and sent
7 it back to the Second Circuit for consideration.

8 Now, in the interest of candor, the
9 Second Circuit or the district court found that,
10 in fact, there were special factors counseling
11 hesitation in that case.

12 But the -- the fact remains that the
13 framework that was set forth in Abbasi, I think,
14 allows the Court to consider and weigh these
15 different competing factors in the way that
16 courts do every day in the qualified immunity
17 context, in applying the exclusionary rule, in
18 various other factors.

19 JUSTICE GORSUCH: Well, you know, in
20 those contexts -- take qualified immunity. I --
21 I -- I -- I kind of get my head around at least
22 what I'm supposed to try to do there, right, is
23 the law clearly established, and I look on the
24 books and see if I can find it.

25 Here, we can't even agree on step 1,

1 whether this is a new -- I mean, how many years
2 on from Bivens and we can't even agree what a
3 new context is?

4 MS. ELLSWORTH: Well --

5 JUSTICE GORSUCH: And then -- and
6 then, when we get to the special factors, I
7 mean, I think, as our discussion today has
8 illuminated, it isn't exactly like looking on
9 the books to see if there's a case on point.

10 MS. ELLSWORTH: And I would say that
11 the lower courts have not respectfully struggled
12 to -- to quite the same degree with applying
13 the -- the Abbasi framework.

14 There have been -- and they're cited
15 in all the briefs -- there have been cases since
16 Abbasi where lower courts have -- have concluded
17 that a Fourth Amendment unlawful search and
18 seizure, like we submit this case, is not a new
19 context and that Bivens applies.

20 And there have been many other cases
21 where the Court has concluded either it's a new
22 context or that special factors apply and has
23 not --

24 JUSTICE GORSUCH: Except for you argue
25 on the first one that the Ninth Circuit's wrong,

1 that this isn't a new context, right? I mean,
2 you say, well, the lower courts have had no
3 problem finding this isn't a new context, except
4 for this one did.

5 MS. ELLSWORTH: Well, the Sixth
6 Circuit in -- in the -- the case cited in our
7 brief at page 31 found no new context in a
8 Fourth Amendment --

9 JUSTICE GORSUCH: So we have a
10 disagreement between the Sixth and Ninth Circuit
11 on whether this is a new context?

12 MS. ELLSWORTH: Well, it's, obviously,
13 different cases. But I don't think that -- I
14 mean, I think the Court can also consider the
15 same factors that the Court considers in
16 determining whether something is a new context.
17 They seem to bleed over into the special factors
18 as well. Either way you slice them here, I
19 don't think --

20 JUSTICE GORSUCH: That's another
21 problem. What do we do about that? The same
22 considerations at step 1 bleed into step 2,
23 and -- and -- and normally, when we have a
24 two-step test, we have two steps. And, here,
25 it's kind of, as you say, one and a half.

1 MS. ELLSWORTH: Well, and either way,
2 whether the Court considers it under step 1 or
3 the Court considers it under step 2, none of the
4 factors that were outlined in *Abbasi*, nor any
5 other factors that have been raised by either
6 the United States or Petitioner, are a reason
7 why this Fourth Amendment claim should not be
8 allowed to proceed.

9 JUSTICE BARRETT: Ms. Ellsworth, let
10 me ask you a question, the questions following
11 up that Justice Breyer and I were asking about
12 skepticism and given that the Court hasn't
13 recognized a new *Bivens* claim in decades, given
14 that the Court has said that they're disfavored.

15 When we're asking these questions
16 about level of generality and going through the
17 factors, do you think our precedent puts a thumb
18 on the scale of skepticism and a thumb on the
19 scale counseling the Court to treat it as a new
20 context?

21 MS. ELLSWORTH: I don't think the -- I
22 don't think the -- I -- I think it's fair to say
23 that the Court has treated *Bivens* claims with
24 skepticism over the past several decades. That
25 is certainly fair.

1 The -- I don't think the Court has put
2 a thumb on the scale in favor of finding a new
3 context per se. And like I said, in *Abbasi*, the
4 Court found --

5 JUSTICE BARRETT: No, in favor of not
6 finding a new context.

7 MS. ELLSWORTH: In -- in favor of not
8 finding a new context, yes.

9 I think what the Court has done has
10 been appropriately guarded in expanding the
11 remedy of -- of *Bivens* beyond where it has
12 already been recognized.

13 And, of course, it has been recognized
14 time and again not just in *Bivens* but in *Wilson*
15 versus *Layne* and in other cases in the
16 Fourth Amendment context.

17 JUSTICE BARRETT: So, like, just so
18 far we would try to apply precedents so that if
19 it looks just like *Bivens*, if it's a Fourth
20 Amendment excessive force claim or, you know, if
21 it's another Fourth Amendment, say, unreasonable
22 search-and-seizure claim, in those contexts, we
23 would say, okay, fair application of *Bivens*
24 means this is exactly the same, but we don't
25 have to have any skepticism when we're

1 considering the factors about extending it into
2 new areas? We're just kind of faithfully
3 applying it like we would any other precedent,
4 rather than trying to narrow it?

5 MS. ELLSWORTH: I -- I think the Court
6 has already narrowed Bivens substantially. And
7 I don't read the Court's more recent decisions
8 as attempting to further narrow it but rather
9 attempting to determine how to fit individual
10 cases within the framework that has been set
11 forth.

12 And -- and, of course, this two-step
13 framework that we're talking about really was
14 only announced in its current form in the Abbasi
15 case five years ago. Prior to that, there
16 were -- alternative remedies were playing a
17 larger role in the Court's determination of
18 whether Bivens was available.

19 JUSTICE KAGAN: So do I read you right
20 in saying something like, look, what Bivens has
21 become is basically a remedy for Fourth
22 Amendment violations, and whatever skepticism
23 you might have outside of that context -- I
24 mean, I guess there are a couple of other
25 contexts, right, but -- but -- but the big --

1 the bulk of Bivens claims are Fourth Amendment
2 claims. Whatever skepticism you might have
3 outside of that, it's inappropriate to import
4 into Fourth Amendment search/excessive force
5 cases?

6 MS. ELLSWORTH: I -- that's -- I think
7 that's correct, Your Honor, and that certainly
8 is what -- what courts have called the core or
9 heartland of Bivens. It's what this Court in
10 Abbasi recognized was the area in which Bivens
11 had continuing force and necessity.

12 And so the -- the Fourth Amendment
13 claim seems much less difficult. I --

14 JUSTICE BARRETT: So that makes your
15 First Amendment claim a lot more difficult.

16 MS. ELLSWORTH: The First Amendment
17 claim is -- is -- is an uphill battle, Your
18 Honor. The First Amendment claim was found to
19 be in a new context by the Ninth Circuit.

20 The Hartman versus Moore case did not
21 hold that Bivens was available in the First
22 Amendment context, but it did, of course, state
23 that when the vengeful officer is federal, a
24 Bivens remedy lies. Whether that amounts to
25 recognizing a Bivens claim or not, the -- the

1 idea that special factors counsel hesitation in
2 the First Amendment context we think is not
3 appropriate in this case or not appropriate in
4 the narrow type of First Amendment retaliation
5 claim that Mr. Boule is bringing here.

6 This is not a retaliation claim that
7 relates to malicious prosecution or to arrest or
8 to anything else that's within, as the Ninth
9 Circuit put it, "the scope of the official
10 duties of the officer." What we have here is
11 Agent Egbert calling and sending a publicly
12 available news article to these other agencies
13 with, we -- we allege, retaliatory motive in --
14 in retaliation for Mr. Boule's complaints to
15 supervisors about the conduct on March 20, 2014.

16 That's the type of retaliation this
17 Court has called straightforward in terms of
18 issues of causation. And while it may be an
19 extension of Bivens to recognize the First
20 Amendment claim, it is not one in which there
21 are any special factors that counsel hesitation.
22 There's no national security concerns. There's
23 no administrative regime that could be available
24 to Mr. Boule to otherwise press these claims.

25 The state law claims that both the

1 Petitioner and the United States have suggested
2 would be available to Mr. Boule are not
3 available, again, because of the Westfall Act
4 because the conduct, while it is not part of his
5 official duties, would fall outside his scope of
6 employment for purposes of Washington law, which
7 is where this Court looks.

8 And the FTCA is -- while it may be an
9 alternative remedy in some senses, it is not an
10 exclusive remedy to Bivens. Mr. Boule also was
11 not able to actually bring his First Amendment
12 claims under the FTCA for -- for time-barred
13 reasons.

14 But, putting that to the side, the
15 FTCA and the Bivens continue to co- -- and
16 Bivens continue to co-exist, and so that's not a
17 reason why the First Amendment claim should not
18 be recognized here.

19 JUSTICE KAGAN: On -- on the Fourth
20 Amendment front, how do we -- how should we
21 properly handle invocations of national security
22 by the government?

23 MS. ELLSWORTH: Well, I would -- I
24 would remind the Court that the government
25 didn't see fit to invoke national security or

1 participate in this case until it reached this
2 Court. So the government did not participate in
3 the Ninth Circuit or the district court and
4 suggest that there were some national security
5 concerns attendant to this claim against a
6 Border Patrol officer.

7 But I think what the Court should
8 consider is whether the -- the specific type of
9 claim that would be recognized, which, again,
10 here is going to be a garden-variety
11 search-and-seizure claim on private property
12 against a U.S. citizen, that whether there's
13 some national security considerations that are
14 attendant to that, and -- and -- and there are
15 none. The only national security considerations
16 that have been invoked are the fact that Agent
17 Egbert is affiliated with the Border Patrol.

18 That's not sufficient. There may be
19 some Border Patrol functions that do implicate
20 national security. In fact, surely there are.
21 But this is not one of them.

22 JUSTICE ALITO: Do you think it
23 matters? And -- and do I understand your last
24 answer to mean that it matters what a particular
25 Border Patrol agent's usual duties are as

1 opposed to what the Border Patrol agent is doing
2 at the time of the alleged tort?

3 MS. ELLSWORTH: I -- I think it's the
4 latter, Justice Alito. I think it's the conduct
5 that the agent is involved in at the time.

6 JUSTICE ALITO: Well, so, here, he's
7 following up on a call from your client about
8 somebody -- why did your client call the agent
9 about this individual?

10 MS. ELLSWORTH: Actually, Agent Egbert
11 had stopped Mr. Boule. He performed a -- a
12 vehicle stop on the road earlier that morning.
13 And, during the course of that stop, Mr. Boule
14 informed Agent Egbert that there would be
15 somebody arriving at the inn that evening.

16 JUSTICE ALITO: And why did he inform
17 him of that?

18 MS. ELLSWORTH: That is not clear from
19 the record. That's the type of factual
20 development that we would hope to have the
21 opportunity to develop at trial.

22 JUSTICE ALITO: You mean, if -- if --
23 if he knew that one of us was going to check in
24 to the Smuggler's Inn and he happened to be
25 stopped by a Border Patrol agent, well -- he

1 would say, well, by the way, well, it's -- maybe

2 --

3 JUSTICE KAGAN: Suspicious characters.

4 (Laughter.)

5 JUSTICE ALITO: Yeah. Any ordinary
6 person was checking in to the -- to the -- the
7 Smuggler's Inn, he would have told the -- the
8 agent?

9 MS. ELLSWORTH: I -- I don't have the
10 answer to that, Justice Alito. I mean, I think
11 it's important to keep in mind a few things.

12 JUSTICE ALITO: And did he tell him
13 that his employees had driven all the way to
14 Seattle to pick up this person and drive the
15 person back for a two-hour drive?

16 MS. ELLSWORTH: Yes, that's the --
17 that is, in fact, typically the service -- one
18 of the services that Mr. Boule provided was to
19 pick people up at the airport.

20 JUSTICE ALITO: Everybody?

21 MS. ELLSWORTH: But one thing to just
22 --

23 JUSTICE ALITO: Everybody who checks
24 in to the Smuggler's Inn, he does that?

25 MS. ELLSWORTH: I -- I don't know if

1 it's an add-on or if it's part of the -- part of
2 the rate, Your Honor.

3 (Laughter.)

4 MS. ELLSWORTH: But Mr. Boule, of
5 course, is -- is working with the government,
6 previously with CBP, and at the time of the
7 incident in question, he was working with
8 Immigration and Customs Enforcement. So whether
9 that's the reason for him having informed Agent
10 Egbert of this or not I don't have the answer
11 to.

12 But the fact of the matter is having a
13 -- a government informant tell an officer that
14 somebody is arriving legally in the country, I
15 just don't think it's reasonable to consider
16 that to be some reasonable suspicion to -- to
17 come onto the property.

18 But I don't think the Court needs to
19 delve into those details and certainly needn't
20 weigh them. The question is whether this type
21 of function, coming to check on the visa status
22 on private property on U.S. soil --

23 JUSTICE ALITO: How -- how far was
24 this actually from the border? From the point
25 where this incident occurred, how far from there

1 to Canada?

2 MS. ELLSWORTH: It's very close. It's
3 maybe 20 feet. It's not far at all from the
4 border. The property -- Mr. Boule's property
5 actually crosses over into Canada.

6 JUSTICE ALITO: Twenty feet?

7 MS. ELLSWORTH: The proximity to the
8 border is not an -- to -- to make sure that the
9 Court is clear, we are not arguing that this is
10 somehow far enough from the border that it
11 doesn't implicate the actual line.

12 The issue here is that the -- the
13 conduct that the agent was involved in has
14 nothing to do with trying to prevent people from
15 crossing over to the United States or even from
16 trying to leave the United States to Canada --

17 JUSTICE ALITO: Why -- why do you say
18 that?

19 MS. ELLSWORTH: Because the conduct
20 that the agent was involved in was following up
21 to ask a question about the visa status of this
22 individual. He's not trying to attempt to stop
23 people from crossing into the country when he
24 went onto Mr. Boule's property to ask these
25 questions.

1 JUSTICE KAGAN: As I understand it,
2 the government is now suggesting that that is
3 what they were concerned with. It -- it seems
4 as though there's just a -- a difference in
5 one's view of the facts here. Is that correct?

6 MS. ELLSWORTH: And I -- I -- I come
7 to this Court with the record that I have. In
8 Joint Appendix 108 is Agent Egbert's sworn
9 declaration -- declaration indicating that after
10 he checked the guest's visa status, there was
11 nothing more for him to do as a Border Patrol
12 agent and he left.

13 CHIEF JUSTICE ROBERTS: This may be
14 the same question I tried to ask earlier, but
15 I've given it a little more thought, so I might
16 be able to phrase it better.

17 We've been talking about does this
18 agent in this case have something to do with the
19 border, is it affected in some way, and the
20 idea, I guess, is, if it is, maybe there
21 shouldn't be a Bivens action, but there -- if
22 there isn't, maybe there should be.

23 But the context is sort of we're --
24 we're -- we're stepping into the authority that
25 would normally be vested in Congress in terms of

1 whether or not to provide a cause of action.
2 And if Congress were sitting down saying should
3 there be a cause of action, it's not going be
4 parsing the particular facts, say, well, there
5 should be a particular cause of action if this,
6 this, and this. Presumably, they would say
7 Border Patrol agents are not liable for actions
8 on the part of this or something like that.

9 And shouldn't we take that into
10 account and -- and not be so terribly concerned
11 about the particular facts but more what
12 Congress would think about the consequences for
13 its border agents and -- and whether it would
14 draw a particular line on that basis?

15 MS. ELLSWORTH: Let me try and answer
16 that question in a few different ways.

17 The first is the -- what the Court
18 would be doing here were it to recognize --
19 affirm the Ninth Circuit and recognize the
20 availability of Bivens would be to -- to find
21 that this conduct falls within a cause of action
22 that the Court has already implied in Bivens in
23 the Fourth Amendment context, to go to Justice
24 Kagan's point. So I don't think that the Court
25 would be involved in -- in that form of implying

1 a cause of action here because it would fit
2 within the conduct of Bivens.

3 But Congress has not -- there --
4 there's no suggestion in the statutory
5 background here that Congress has made any
6 statements that suggest that it does not view
7 Border Patrol agents as being susceptible to
8 Bivens or -- or would have concerns here.

9 And I don't think the Court would need
10 to engage in the type of weighing that your
11 question suggests in order to determine that
12 this conduct, which we can -- we can make it a
13 higher level of generality, following up on a
14 tip, going onto private property, questioning an
15 individual, and using excessive force,
16 allegedly, all of those -- that's all conduct
17 that court -- the Court is able to weigh and
18 judge and weighs and judges in a variety of
19 different cases.

20 And it's not conduct -- not -- it
21 wouldn't require the sort of line-drawing that I
22 think some of the factual questions have -- have
23 suggested.

24 And the idea that the Border Patrol
25 writ large can't be subjected to a Bivens

1 action, not only would it sweep very broadly,
2 but it's also contrary to, you know, the Court's
3 decision in -- in Hernandez and -- and some
4 other lower courts' decisions that have allowed
5 Bivens cases to go forward against Border Patrol
6 agents, Immigration and Custom Enforcement
7 agents, and other agents who are involved in
8 either border security or immigration-related
9 matters, so long as there is not a national
10 security reason to hesitate, which, in this
11 case, there's not.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Anything further? No?

14 Thank you, counsel.

15 MS. ELLSWORTH: Thank you, Mr. Chief
16 Justice.

17 CHIEF JUSTICE ROBERTS: Rebuttal, Ms.
18 Harris?

19 REBUTTAL ARGUMENT OF SARAH M. HARRIS
20 ON BEHALF OF THE PETITIONER

21 MS. HARRIS: Thank you, Mr. Chief
22 Justice. Three quick points.

23 First of all, there's been a lot of
24 debate about how to define a new context and
25 what is new in this context.

1 I think the question -- one of the
2 questions is what is the heartland of Bivens, is
3 it really anytime a law enforcement officer
4 happens to be performing regular law enforcement
5 duties or it's something else?

6 I do think that that is not quite
7 presented here because the actual duties of
8 whether you look at the Border Patrol or what
9 Agent Egbert is acting under are specific
10 statutory authorities for the Border Patrol
11 involving immigration enforcement, illegal entry
12 and exit. That's 6 U.S.C. 211 and 8 U.S.C.
13 1357.

14 We are not talking about the -- about
15 the boundaries of figuring out what did the
16 Court mean in Abbasi by the context in which
17 there would not be new extensions of Bivens.

18 So I think a lot of that debate just
19 depends on how -- you know, what happens when
20 you do have a Bivens extension, and I think that
21 is this case.

22 And the -- the second point I'd like
23 to make is how broadly should the Court be
24 looking at the officer's functions or the facts
25 on the ground. And I think there really is a

1 contrast between our positions.

2 As perhaps the Chief's most recent
3 question indicates, I don't think it's -- it's
4 right to think that Congress would be looking at
5 the granular details of whether Agent Egbert
6 should have stopped someone, you know, 50 meters
7 from the Smuggler's Inn or at the Smuggler's Inn
8 driveway or perhaps on the road up to the
9 Smuggler's Inn.

10 I think the question that this Court's
11 cases have looked at -- and Hernandez is a
12 particularly good example -- is what is the type
13 of conduct that the officer is engaged in? It's
14 not, you know, Agent Mesa in Hernandez engaged
15 in a purportedly unjustified cross-border
16 killing of a teenager.

17 It is situations where Border Patrol
18 agents might be needing to use or use -- use --
19 use force or, here, situations in which Border
20 Patrol agents are concededly performing
21 immigration functions.

22 I think that has to be right because,
23 if you were to allow a Bivens claim in this
24 context, you would be having the prospect of
25 liability hanging over officers' heads, and they

1 need to know sort of not just, you know, if you
2 visit the Smuggler's Inn you'll be -- you'll be
3 subject to Bivens liability but, more broadly,
4 if you are engaged in an immigration search and
5 you have to use force, what are the contours of
6 your liability going to look like.

7 And then zooming out even further,
8 courts have to ask, I think, under Abbasi and
9 Hernandez, what are the costs of that going to
10 be for the Border Patrol? What are the
11 litigation costs? What are the systemic costs
12 going to look like? What's the deterrent effect
13 on top of all of the other remedies that are out
14 there for dealing with this type of conduct,
15 including the internal investigations Congress
16 has mandated?

17 So I think that really is the right
18 level of generality. And one confirmation of
19 that is that courts of appeals other than the
20 Ninth Circuit have, indeed, suggested that
21 immigration enforcement and the conduct of
22 agents at the border are always going to be
23 special factors because they are so intimately
24 tied to national security and immigration
25 functions. And those are two things that have

1 always been entrusted particularly to the
2 political branches.

3 And the fact that courts of appeals
4 have been seeing that other than the Ninth
5 Circuit, I think, also gives some comfort that
6 that is a workable rule, it has not produced bad
7 consequences in those circuits, and those are
8 three circuits, the Fifth, the Sixth, and the
9 Eleventh, have said that now for, you know, at
10 least several years. So I think that should
11 give some additional comfort.

12 And just one third point, which is
13 that the state of play now is there are 60 cases
14 in the courts of appeals after Abbasi; only two
15 extensions from the Ninth Circuit. I think that
16 strongly suggests the time for Bivens extensions
17 may have been done.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 11:11 a.m., the case
22 was submitted.)

23

24

25

Official - Subject to Final Review

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